91-1320

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE HARRIS,

Petitioner,

v.

TERRY L. HALE, D.D.S.,
TERRY L. HALE, D.D.S., Inc.,
DOES 1-100,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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QUESTIONS PRESENTED

1. Whether Petitioner was deprived of his Fourteenth Amendment right to due process, where, without prior notice and full opportunity for hearing, the trial court dismissed his case on the day of trial for allegedly not complying with prior court orders which were contrary to established rules and statutory provisions and thus void as in excess of the court's jurisdiction?

2. Whether an individual litigant is deprived of procedural due process under the Fourteenth Amendment when a trial court issues orders which are contrary to the power conferred to it by statutes or rules of court?

3. Does the Due Process Clause of the Fourteenth Amendment preclude an appellate court from scrutinizing the decisions of a trial court under the

deferential abuse of discretion standard when the appellant claims that the trial court issued orders which were contrary to and beyond the power conferred by specific statutes and rules?

PARTIES TO THE PROCEEDINGS

There are no parties other than those named in the caption.

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OCTOBER TERM, 1991

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DOES 1-100,

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Petitioner, GEORGE HARRIS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, filed on August 6, 1991 and final after the denial of a Petition for

Review to the Supreme Court of the State of California entered on November 13, 1991.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two is not reported. A copy is attached hereto as Appendix A.

The Order denying Petition for Rehearing to the Court of Appeal of the State of California, Second Appellate District, Division Two is not reported. A copy is attached hereto as Appendix B.

The Order denying Petition for Review to the Supreme Court of the State of California is not reported. A copy is attached hereto as Appendix C.

JURISDICTION

The Court of Appeal of the State of California, Second Appellate District,

Division Two filed its decision on August 6, 1991, affirming the judgment of dismissal with a modification as to the cost bill. A timely petition for rehearing was denied on August 23, 1991. Thereafter, on November 13, 1991, the Supreme Court of the State of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

California Code of Civil Procedure sections 34, 1005, 2023 and 2034 and California Rules of Court, Rule 209 are

involved in this petition. The text of pertinent portions of the provisions involved are set forth in Appendix D.

STATEMENT OF THE CASE

On October 2, 1985, Petitioner filed a complaint in Los Angeles County Superior Court seeking damages for dental malpractice against Respondents, his former dentists. Respondents successfully challenged this pleading under California law alleging the failure to state a cause of action. Leave to amend was granted.

Two subsequent pleadings by Petitioner were also challenged. Respondents' challenge to the sufficiency of the second amended complaint was sustained without leave to amend. Petitioner, acting in pro per, appealed to the Court of Appeal of the State of California, Second Appellate District, Division Two. The court reversed

the judgment as to causes of action alleging negligence, fraud and misrepresentation.

Jurisdiction was returned to the Superior Court and a third amended complaint was then filed on July 3, 1989, alleging the above causes of action. Respondents answer was filed on November 22, 1989.[1]

At an unrelated hearing held on April 6, 1990, the court inquired as to the state of the case and whether or not an At-Issue memorandum, the document necessary to place a matter on the Civil Active List, had been filed and whether expert witnesses had been designated. Neither had occurred. Although California

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[1] Petitioner unsuccessfully challenged the answer by judgment on the pleadings, however the basis for this challenge is not pertinent to the issues presented in this Petition.

Code of Civil Procedure provides a specific procedure for designation of experts as a discovery device, the court ordered the parties to designate their experts within 30 days and to comply with the pertinent Code provisions. No At-Issue memorandum was filed, yet trial was set for August 6, 1990.

Respondents served their expert witness designation on May 3, 1990. Petitioner did not provide a designation.[2]

[2] The record reflects that Petitioner tried to obtain an expert witness during this time. These efforts were hampered due to lost records and closure for spring break, of the dental school where he had subsequent care due. Petitioner attempted to obtain an x-ray of a tooth involved in the case from Respondents' counsel and from Respondents' dental office. These efforts were also unsuccessful. Although California Health and Safety Code sections 1795 et seq. gives patients access to their records, Respondents prevented Petitioner's access by claiming that Petitioner had to follow the proper discovery procedures. Even Petitioner's effort to obtain a court order for release of his x-ray was denied. The only reason

In an effort to block further designation, on May 31, 1991, Respondents served a notice asserting that Petitioner had waived the expert witness designation. They objected to any subsequent late designation.

On July 13, 1990, Respondents' motion to compel answers to deposition questions and for production of documents was heard along with Petitioner's concurrently filed motion for judgment on the pleadings and vacation of trial date. Petitioner challenged the court orders requiring expert witness designations and setting the matter for trial as a violation of due process under the Fourteenth Amendment, asserting the failure to follow the required procedures.

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authorization by Petitioner under California Evidence Code section 1158.

References to the specific and pertinent portions of the record are set forth in Appendix E.

Respondents' motion asserted that Petitioner refused to answer questions regarding his identity, residence address, and other matters occurring during the course of the litigation. Petitioner also refused to produce certain requested documents. At the hearing on the motions, Petitioner again asserted a due process violation by the court orders. In spite of his constitutional challenges, Petitioner was ordered to respond as requested within 10 days and his motion for judgment and to vacate the trial date was denied.

The case was called for trial on August 6, 1990, and all parties responded

ready.[3] Respondents brought a series of motions *in limine*, seeking among other matters, to preclude Petitioner from presenting any expert testimony; to preclude Petitioner from testifying on any matters where he did not comply with the discovery orders; and to preclude Petitioner from testifying as an expert witness. These motions were granted over Petitioner's objections on, among other grounds, the lack of notice and opportunity to be heard in violation of his due process rights. Petitioner challenged the validity of the initial order to designate experts. After granting the various motions *in limine*, without any prior notice, Respondents orally moved to dismiss on the basis that Petitioner was

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[3] Although he responded ready, Petitioner indicated that it was under protest.

not ready to proceed. Petitioner again voiced objection to the entire preceding as a violation of California procedures and his due process rights.

The court made a finding that the Petitioner had failed to designate an expert in the field of dental malpractice and therefore was unable to go forward. He indicated that Petitioner had failed to comply with court orders as to the designation of an expert and orders compelling discovery responses. Therefore, the case was dismissed with prejudice.

Petitioner filed a motion to vacate the order and judgment of dismissal and to strike the cost bill. The motion was heard and denied on October 5, 1990. Petitioner then filed his Notice of Appeal on October 29, 1990. Petitioner asserted that the initial court orders as well as the ultimate dismissal based on those orders

were invalid under the Due Process Clause of the Fourteenth Amendment. The Court of Appeal concluded that Petitioner's claim was without merit. On August 6, 1991, they affirmed the judgment as to the dismissal and modified the costs. Petitions for rehearing and for review to the Supreme Court of the State of California were denied without opinion on August 23, 1991 and November 13, 1991, respectively.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO DECIDE THE SCOPE OF ADHERENCE REQUIRED OF TRIAL AND APPELLATE COURTS TO IMPORTANT STATUTORY PROCEDURES DESIGNED TO PROTECT THE DUE PROCESS RIGHTS OF LITIGANTS PROPERLY BEFORE THE COURT.

This case raises an important question pertaining to the denial of due process to civil litigants everywhere. This Court long ago settled that a denial of due process based on lack of proper

notice of the existence of legal proceedings renders a judgment invalid. *Mullane* v. *Central Hanover Bank and Trust*, 339 U.S. 306, 313-315 (1949). Procedural due process cases decided by this Court such as *Mullane*, have generally concerned situations where the lower courts acted without jurisdiction over the parties due to lack of proper service or notice of the action or without jurisdiction over the subject matter of the action. See e.g., *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). Other due process cases have considered challenges to particular statutory provisions or various administrative proceedings as not satisfying the necessary constitutional protections. See e.g. *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Vlandis* v. *Kline*, 412 U.S. 441 (1973) and *Atkins* v. *Parker*, 472 U.S. 115 (1985). More recently the Court has

considered the requisites of a claim under 42 U.S.C. section 1983 based on due process violations. *Zinermon* v. *Burch*, 494 U.S. 113, 108 L.Ed.2d 100 (1990).

An important question remains concerning the scope of due process rights where the court is properly vested with jurisdiction over the parties and the matter but during the course of proceedings exceeds its jurisdiction by rendering decisions contrary to statutory procedures. Petitioner asserts that due process rights are not waived simply because a party is properly served or a party to litigation. As with any form of waiver of a constitutional right, it must be clearly demonstrated. *Brady* v. *Maryland*, 397 U.S. 742, 748 (1970); *Fuentas* v. *Shevin*, 407 U.S. 67, 95 (1972). Nothing in Petitioner's actions or conduct demonstrates a waiver.

During the course of judicial proceedings, many court orders can impair or curtail property rights. Due process is "a guarantee of a fair procedure" and must be afforded prior to any deprivation of rights. *Zinermon*, 494 U.S. 113, 108 L.Ed.2d 100, 114. Almost one hundred years ago, in *Scott* v. *McNeal*, 154 U.S. 34, 46 (1893), this Court noted that when applied to judicial proceedings, due process means:

> a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

Where, as in this case, a court ignores established rules and recognized procedures specifically designed to ensure constitutional protection during litigation, decisions in conflict with those

rules are equally a violation of this fundamental right.[4]

Notice and opportunity to be heard are the touchstone of due process under the Fourteenth Amendment. *Mullane*, 339 U.S. at 313. The fundamental requisite of due process is the opportunity to be heard. *Goss* v. *Lopez*, 419 U.S. 565, 579 (1974). The particular form of the notice and hearing in any case, must measure up to standards of due process. *Mullane*, 319 U.S. at 313.

Indeed, in *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) this Court concluded that the opportunity to be heard "must be granted at a meaningful time and in a

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[4] California courts have repeatedly held that a court does not have the power to act contrary to a prescribed procedure. See e.g. *Safer* v. *Superior Court*, 15 Cal.3d 230, 242 (1975); *Burtnett* v. *King*, 33 Cal.2d 805, 807 (1949); *Baker* v. *Superior Court*, 71 Cal. 583 (1887).

meaningful manner." For this fundamental right to retain its meaning, it is necessary that this Court firmly establish that due process must be protected throughout the course of litigation. Procedural statutes requiring prior notice or specifying the manner in which the court or parties may act cannot be circumvented.

This case presents a prime example of the liberties that courts take with a litigant's due process rights under the guise of judicial discretion. Not only did the trial court ignore established procedures, but the Court of Appeal sanctioned these repeated violations of Petitioner's due process rights. These practices should not be permitted to continue. The question at hand turns on whether Petitioner has been accorded the hearing which the statutes require. *Morgan*

v. *United States*, 298 U.S. 468, 473 (1935).

It is important that the Court grant review to impress upon the judiciary of this country the need to follow rules and statutes enacted to protect due process rights. Without review, courts will continue to issue orders in violation of established procedures, subject to nothing more than judicial whim or a desire to clear the court's calendar.

This is an appropriate vehicle for considering the issue since the trial court blatantly ignored established rules and procedures, not once but five times during the proceedings. The result was the dismissal of Petitioner's case without prior notice and the denial of his property interest in the pending causes of action. California Civil Code §655; *Hunt v. Authier*, 28 Cal.2d 288, 296 (1946).

Judicial efficiency was improperly favored over Petitioner's important constitutional rights. *Stanley*, 405 U.S. at 656.

The specific instances where the court disregarded procedures, sacrificing Petitioner's rights in favor of clearing its calendar are briefly summarized for this Court to understand the severity of the problem.

A. The Order Requiring Designation Of Experts Was In Conflict With California Statutory Procedures.

California Code of Civil Procedure section 2034[5] sets forth a method for

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[5] The Legislature has broad powers to prescribe procedures under which courts exercise their jurisdiction. *Sacramento & San Joaquin Drainage Dist.* v. *Superior Court*, 196 Cal. 414, 432 (1925). California Code of Civil Procedure section 34 makes it clear that the provisions of the Code apply to all actions and proceedings before the trial courts.

discovery of the party's expert witnesses for trial. This section provides the sole authorization for this form of pretrial discovery in California and sets up a permissive method for requesting this type of information. The pertinent portions of Section 2034, subdivision (a) states:

> (A)fter the setting of the initial trial date for the action, any party **may** obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses . . . : Emphasis added.

This is a purely voluntary system of discovery. If, by plan or by oversight, neither party serves a demand, there is no requirement of disclosure. There is also no statutory basis for the court to order the parties to engage in discovery which

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Unless otherwise specified, all statutory references are to the California Code of Civil Procedure.

is purely permissive under the code. The court does not have the power to issue orders conflicting with the legislative enactments. *St. Vincent* v. *Superior Court*, 160 Cal.App.3d 1030 (1984).

The *St. Vincent* court concluded that the minimum time periods provided in then Section 2037, subdivision (a)[6] for service of a demand to exchange expert witnesses lists permit no deviation; any contrary order is void and unenforceable. 160 Cal.App.3d at 1033.

The code specifically provides the requisite dates, times, and guidelines for demanding this method of discovery. Code of Civil Procedure section 2034, subdivision (b) specifies that if made, a demand must be served either 10 days after

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[6] The Discovery Act was amended, and this section renumbered as Section 2034, however, the changes in this section did not alter the powers of the trial court.

the date first set for trial or 70 days before trial, whichever is closer to the date of trial. There is no provision for altering the time for service of this demand.

Section 2034, subdivision (c) then specifies that the date of exchange is to be "50 days before the initial trial date or 20 days after service of the demand, whichever is closer to the trial date, **unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange.**"[7] The change of date by motion and good cause only pertains to the actual exchange, this does not permit a court to interfere with the timing for a party's demand for exchange.

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[7] The court order, although beyond the power of the court, was also contrary to this portion of the code since the order required exchange 41 days before the time set forth in the code. Code of Civil Proc. §2034, subd.(c).

In this case, the court had no power to order an exchange of expert witnesses. The Legislature left it up to the parties to demand exchange under Section 2034, if they elected to do so. The court has no discretion to act contrary to the statute. *Burtnett*, 33 Cal.2d at 807. Therefore, the court order requiring designation of experts within 30 days was void as in excess of the court's jurisdiction and a violation of due process.[8] *Safer*, 15 Cal.3d at 242. "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without

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[8] "[W]hen a statute authorizes a prescribed procedure, and the courts act contrary to the authority thus conferred, it has exceeded its jurisdiction." *Abelleira* v. *District Court of Appeal*, 17 Cal.2d 280, 290 (1941). Where the court acts beyond the limits of its powers, the judgment is void. *Burtnett*, 33 Cal.2d at 807.

notice to the party." *Scott*, 154 U.S. at 46.

The Court of Appeal sanctioned this violation by ignoring the precise language of the statute and referring to a small portion of Section 2034, subdivision (c) out of context. The section pertains to alteration of the date of exchange in response to a demand and made by motion and proper showing. It did not apply to the order of the trial court. This was simply an effort by the Court of Appeal to justify the actions of a lower court where further review by higher courts was unlikely. Protected by the difficulty in obtaining further review, the Court of Appeal merely needed some basis, however inapplicable, to justify its decision.[9]

[9] The Court of Appeal had little concern that Petitioner might successfully obtain review in this Court or the California Supreme Court. Not only are the

Despite the lack of statutory authority, the trial court issued an order which violated Petitioner's rights. Adding insult to injury, the court unilaterally shortened the statutory time for exchange by 41 days, placing an impossible burden on an in pro per plaintiff.

B. An At-Issue Memorandum Triggered The Power Of The Court To Set A Trial Date; Without This Document The Court Lacked The Power To Set The Case For Trial.

Pursuant to authority conferred by California Constitution, Article VI, section 6, the Judicial Council enacted the California Rules of Court. On April 6, 1990, at the time this case was set for trial, these rules limited the power of

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percentages against Petitioner, but the Court of Appeal had the power to almost assure no further review by simply ordering that its Opinion not be published in the Official Reports and therefore would not have value as precedent. California Rules of Court, Rules 976 and 977.

the court to set a case for trial. Rule 209, in effect in 1990, provided "**[n]o civil case shall** be placed on the civil active list or **be set for trial until** it is at issue and the party has **served and filed an at-issue memorandum** . . ."[10] Emphasis added. These rules of court carry the weight of law unless they are in conflict with existing statutes. *In re James A.*, 101 Cal.App.3d 332, 339, n.3 (1980); *Cantillon* v. *Superior Court*, 150 Cal.App.2d 184, 187 (1957).

The at-issue memorandum was required before trial could be set and placed the burden upon the litigants to actively

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[10] Effective January 1, 1991, Rule 209 was amended as the court predicted. An at-issue memorandum is no longer necessary to trigger the court's power to set a trial date. As amended, the court may now set a trial date if it deems the case to be at-issue. This amendment did not alter the power of the court as it existed at the time the court set the case for trial.

pursue the litigation. California Rules of Court, Rule 209. As incentive to file this document and proceed to trial without undue delay, the California Legislature enacted a comprehensive scheme providing for dismissal after specified times based on a lack of diligence in prosecuting a case. See Code of Civil Proc. §581 *et seq.* To withstand constitutional challenge, these sections have built-in due process protections requiring proper notice and hearing before involuntary dismissal may be ordered. *Id.*

The record in this case shows that no at-issue memorandum was filed at any time prior to April 6, 1990. R.T. 6:11-20. Petitioner was well aware of this fact and the requirement of this document to trigger the setting of a trial date. However, the court did not want this case to "clog up the system.," R.T. 12:1-11.

Acting out of its own sense of a need to clear its calendar and its belief that the at-issue requirement was out-dated, the court set a trial date in direct contravention of existing and long standing rules. This act was void as in excess of the court's jurisdiction and another violation of Petitioner's due process rights. *In re Cowan*, 230 Cal.App.3d 1281, 1289.

Without an at-issue memorandum filed Petitioner was entitled to believe that the case could not be set for trial. He had no way of knowing that the court would take it upon itself to ignore the rules and order a trial date in spite of this missing requirement. Due process required that the court follow the rules, not its own notions of fairness and expediency. Petitioner had no proper notice that the case would be set for trial at that time.

He had no chance to question the actions which set in motion a chain of events leading to dismissal. Petitioner had no due process.

Both the trial court and the court of appeal repeatedly expressed that Petitioner, acting in pro per, was held to the same standards as an attorney. He must be treated the same, "no different, no better, no worse." *Doran* v. *Dreyer*, 143 Cal.App.2d 289, 290 (1956). Although on occasion, the courts have given some leeway to pro per litigants, this is an accurate statement of the law and clearly significant to this case. *Pete* v. *Henderson*, 124 Cal.App.2d 487, 491 (1954).

Indeed, the fact that Petitioner was in pro per required strict adherence by the court as well as the parties, to the procedural steps established to provide for proper notice and hearing during the

course of litigation. The importance of the court's adherence to the established procedures is even greater, for a pro per litigant is not necessarily well versed in all aspects of the law. When there are procedures set forth, he should be entitled to rely on those procedures. Ad hoc alterations of the procedures to suit judicial needs, as in this case, interject an unfair element of surprise and do not comport with notions of due process. Only by requiring complete compliance by the court can a litigant know in advance what to expect and how to proceed. Court variance as in this case does not satisfy due process.

C. Due Process And Specific Statutory Procedures Required A Noticed Motion Before The Court Issued Sanctions For Failure To Comply With Its Orders.

Section 2023 provides for a variety of sanctions which **may** be imposed for misuse of the discovery process. Disobedience of a court order to provide discovery is a misuse. Code of Civil Proc. §2023, subd.(a)(7). This section empowers the court to impose any of a number of sanctions only "after **notice** to any affected party, person, or attorney, **and** after opportunity for hearing . . ." Code of Civil Proc. §2023 subd.(b), emphasis added. Available sanctions include among other things, issue or evidence preclusion and a variety of terminating sanctions such as dismissal or judgment by default. *Id.* A written notice of motion is required before sanctions under this section may be imposed. *Alliance Bank* v.

Murray, 161 Cal.App.3d 1 (1984); Code Civil Proc. §2023, subd (c).

Here, Respondents filed a motion to compel answers to deposition questions which was granted and Petitioner ordered to comply within 10 days. Petitioner did not comply. On August 6, 1990, the day of trial, Respondents moved *in limine* to preclude Petitioner from testifying at trial in relation to the areas that were the subject of the motion to compel. A written memorandum of points and authorities was submitted to the court for filing that day, after the motion was heard. This document was then served on Petitioner after the case had been dismissed.

Contrary to the statutes, **Petitioner was given no prior notice.** "Failure to give notice violates 'the most rudimentary demands of due process of law.'" *Peralta*

v. *Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1987) citing *Armstrong*, 380 U.S. at 550. Here, Petitioner was placed in the position of learning the facts and basis for the motion at the very moment that he was required to defend against it. *Cowan*, 230 Cal.App.3d 1281, 1289 (1991). The order was void as in excess of the court's jurisdiction. *Id.* It was a violation of Petitioner's Fourteenth Amendment right to due process.

Code of Civil Procedure section 1005, subdivisions (a)(12) and (b) contemplate a hearing prefaced by a written notice of motion served at least 15 days prior to the hearing. Clearly this requirement was not met. Thus, the court order granting this motion violated Petitioner's due process rights and accordingly was void. *Cowan*, 230 Cal.App.3d at 1289.

D. The Order Precluding Petitioner From Presenting Expert Witnesses Relied Upon A Prior Invalid Order Which Violated Petitioner's Due Process Rights And Was Also Invalid.

On the day of trial, Respondents requested by a motion *in limine* an order excluding any expert witnesses from testifying for Petitioner. Aside from the lack of prior notice, the underlying court order requiring designation of experts was invalid as violating Petitioner's Fourteenth Amendment due process rights. See *supra*, pp. 18-24. The invalidity of the first order also invalidated this second sanction order. *Hurtado* v. *Western Medical Center*, 222 Cal.App.3d 1198, 1203-1204 (1990).

E. The Order Of Dismissal Failed To Follow Procedures Necessary To Protect Due Process Rights And Is Also Invalid Because Contingent Upon Prior Invalid Orders.

After granting the various motions *in limine*, the court solicited a motion to dismiss from the defense. Respondents then orally moved to dismiss on the grounds that Petitioner was not prepared for trial. Petitioner objected to the motion as violating his Fourteenth Amendment due process rights because of no adequate notice and the lack of time for a full and fair hearing on the motion.

Where dismissal rests in the discretion of the court, the plaintiff should be given notice of the motion to dismiss and an opportunity to be heard. *Harris* v. *Board of Education*, 152 Cal.App.3d 677, 683 (1957). Notice commensurate with due process must be given before the dismissal. Although there

is the opportunity for appeal, this remedy is illusory in the context of a discretionary dismissal which can only be overturned for a clear abuse of discretion.[11] This is an extremely harsh barrier and not an appropriate remedy for one deprived of his full damage rights. *Denham* v. *Superior Court*, 2 Cal.3d 557, 569 (1970).

The court in this case expressed its concern that because this was a dental malpractice case expert testimony was required. Because of the preclusion order,

[11] Petitioner also challenges the judgment of the Court of Appeal in this case as applying a standard of review too lenient to assure proper consideration of the constitutional infringements alleged. See *infra*, pp. 47-53. In most cases dismissal is a discretionary act. On its face it appears that the deference of the abuse of discretion standard is applicable in this case, however, a more careful review of the particular statutes discloses that the court exceeded its jurisdiction. See e.g. *Burtnett*, 33 Cal.2d at 807.

Petitioner could not present expert testimony. On this basis, the court did not feel that Petitioner could proceed or prove his case.

The court relied upon the failure to comply with court orders pertaining to designation of experts and discovery orders as the basis for dismissal. Once again the court failed to take any steps to assure that Petitioner's due process rights were protected prior to dismissal. Petitioner was forced to try to defend against dismissal at the very moment he was told that this was a possibility. This was unfair surprise and not due process. *Cowan*, 230 Cal.App.3d at 1289.

Further, the initial order requiring designation of experts was invalid and therefore dismissal for failure to comply with the invalid order was equally

improper. *Hurtado*, 222 Cal.App.3d at 1203-1204.[12]

Further, Section 2034, does not permit dismissal for failure to designate an expert. Under subdivision (j), exclusion is the only sanction for this transgression. There is no authority to dismiss a case on this grounds. Arguably, the disobedience of this order might be considered a misuse of the discovery process under Section 2023, subdivision (a)(7) and dismissal might be permitted as a terminating sanction under subdivision (b)(4) of this section. However, aside

[12] *Hurtado* acknowledged that the plaintiff had no choice but to disobey the trial court's initial order and risk the consequences. The plaintiff was obligated to wait until her refusal to comply resulted in either the sanction of dismissal or a judgment on the merits without the benefits of expert testimony before she could seek review on Appeal. 222 Cal.App.3d at 1204, n.3.

from the invalidity of the initial order, a prerequisite to imposition of this sanction is compliance with the proper notice requirements. Code of Civil Proc. §2023, subds.(b) and (c).

No written motion to dismiss was ever made. Code of Civil Proc. §1005, subd. (a)(12) and (b). No prior notice was given either. The oral motion was granted and Petitioner's case dismissed without proper notice and a reasonable opportunity to be heard. This is precisely what due process safeguards are designed to prevent.[13]

Under the facts of this case there was no other conceivable authority for dismissal. Petitioner appeared ready for

[13] "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (1950) (Frankfurter, J., concurring.)

trial. The court was not familiar with the precise nature of the case and what evidence Petitioner intended to present in order to prove his case, yet the court concluded that Petitioner could not prevail because he did not have an expert to testify. The court felt that since this was a malpractice action that expert testimony was an essential element of the case. R.T. 30:6-13. Expert testimony is generally necessary to prove the standard of care, however, this rule is not without exception. *Lawless* v. *Calaway*, 24 Cal.2d 81, 86 (1944). Where the course of treatment is not necessarily beyond a layman's common knowledge, expert testimony is not essential. *Kerr* v. *Bock*, 5 Cal.3d 321, 324 (1971).

Petitioner attempted to explain that there were exceptions to this rule and why he felt that his case fit within the

exceptions. He tried to explain that he did not necessarily need an expert to prove his cause of action for misrepresentation. R.T. 30:14-33:20; *Willard* v. *Hagenmeister*, 121 Cal.App.3d 406, 415-416 (1981). It is apparent however, that the court had made up its mind and was not concerned with what Petitioner had to say.

Two of the four causes of action asserted against Respondents in this case involved fraud and misrepresentation, concerning the dental work actually performed by Respondents. Petitioner could conceivably have proved his case at trial through his own testimony as to the representations that were made to him and the fact of subsequent treatment for precisely what Respondents had allegedly completed. The subsequent treating dentist could have testified as a percipient witness, as to his observations about the

condition of Petitioner's teeth and the procedures that he performed, without the need to express an opinion. *Hurtado,* 222 Cal.App.3d at 1203. It is also possible that Petitioner could have called Respondent Hale to testify as an adverse witness and attempt to establish the standard of care in this manner. *Lawless,* 24 Cal.2d at 90. The court did not let Petitioner explain or make an offer of proof.

The Legislature has provided an avenue for resolving a case short of a completed trial, where the plaintiff cannot prove a prima faciae case. The appropriate procedure would have been to begin the trial and permit Petitioner to present his opening statement, apprising the court and jury as to what evidence he intended to present. If at that juncture, counsel felt that the opening statement

failed to show evidence to support the requisite elements of the causes of action, a motion for a nonsuit could have been made. Code of Civil Proc. §581c; *Carson* v. *Facilities Development Co.*, 36 Cal.3d 830, 838 (1984).

The nonsuit procedure is in keeping with due process and allows the party to make an offer of proof as to his case. Without this added protection, the court's dismissal was based purely on its own notions of malpractice actions in a generic sense. The court did not know specific facts of the case or what Petitioner intended to prove. This is the ultimate deprivation of Petitioner's property interest and cannot stand.

Our judicial system is set up and dependent upon established procedures and safeguards built into the various methodologies utilized in litigating a

case. These procedures are designed to protect Fourteenth Amendment rights to due process, requiring that there be notice and opportunity to be heard before deprivation of important rights may occur.

In *Hurtado* v. *California*, 110 U.S. 516, 535-536 (1884), this Court considered the scope of the Due Process Clause, stating that:

> "[l]aw is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, ... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or an impersonal multitude."

Due process must be "pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained;

. . ." *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 709 (1883).

Unfortunately, our courts have become overburdened due to ever increasing litigation. As a result, administration and efficiency have taken on a new importance in an effort to expedite litigation and unclog the system. Trial delay reduction is a concept which is now a priority in California courts. See California Government Code §68600 et seq.; California Rules of Court, Rules 1901 et seq. and Standards of Judicial Admin. §2.1, California Rules of Court Appendix, Div.1. Efficiency and expediency have tended to usurp the fundamental concept of fairness as our courts are faced with quotas and deadlines.

While there is substantial merit to these concepts, our courts cannot be so

singleminded in meeting these goals and ignore important constitutional rights. In *Stanley*, 405 U.S. at 656, this Court stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. [fn.] Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Review is necessary in this case to provide guidance and send a warning to the courts of this nation that they cannot be blinded by the need for expediency at the risk of trampling ever important due process protections. Existing procedural statutes cannot be ignored simply to move a case along.

This case is indicative of this now persistent attitude to use whatever means possible to unclog the system. Courts may bend and twist the rules and claim "inherent authority" as justification for their actions yet demand absolute precision in following rules, statutes and court orders by litigants. When a litigant such as Petitioner chooses to stand up against this system and refuses to follow invalid orders, this court should stand up and take notice. This case is about the fundamental principles of procedural due process. The Petition should be granted to consider the conflict between the policy of diligent prosecution and requisite due process procedures.

II. REVIEW IS NECESSARY BECAUSE THE COURT OF APPEAL APPLIED THE ABUSE OF DISCRETION STANDARD WHICH IS INAPPROPRIATE WHERE THE ERRORS CLAIMED INFRINGED ON FUNDAMENTAL CONSTITUTIONAL DUE PROCESS RIGHTS.

During the course of judicial proceedings, a court is often empowered to decide an issue in more than one way, exercising its discretion to choose between competing resolutions. *Brown* v. *Newby*, 39 Cal.App.2d 615, 618 (1940). Where the court exercises its discretionary powers, the general standard of review is whether the court abused its discretion in reaching the decision. *Blank* v. *Kirwan*, 39 Cal.3d 311, 331 (1985). This standard is applicable to review of orders imposing discovery sanctions, failure to grant relief and dismissal orders as in this case. See e.g. *Blank*, 39 Cal.3d at 331 (1985): *Elston* v. *City of Turlock*, 38

Cal.3d 227 (1985) and *Midwife* v. *Bernal*, 203 Cal.App.3d 57 (1988).

However, where, as in this case, there is a challenge to the power of the court to act in a particular manner and claims of a denial of due process rights, review under the abuse of discretion standard is totally improper. The court did not have a choice as to how it could act, it did not have discretion. Rather, the court exceeded the powers conferred by the Legislature in issuing several of its orders. *Abelleira*, 17 Cal.2d at 291.

Where issues pertaining to fundamental rights such as due process are raised, the court may not rely upon its discretionary powers. There can be no discretion to violate due process, for a judgment without due process is void. *Pennoyer*, 95 U.S. 714. Where there is a claim of acts "in excess of jurisdiction"

and a resulting due process violation, the court has no discretion to act. The very essence of this aspect of jurisdiction is premised upon situations where a court is empowered to act only in the way authorized by statute. *Burtnett*, 33 Cal.2d at 807. Thus, it is totally inconsistent to review claims of this type of violation under an abuse of discretion standard.

In order to assure that constitutional rights are protected, the scrutiny to be afforded on review of such claims must be stricter than mere review for abuse of discretion. Some degree of heightened scrutiny is essential to avoid compounding the existing problems.

Although not specifically addressing the issue as to the standard of review to be afforded a challenge based on alleged due process violations *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976)

provides a starting point. It has been said that due process is a flexible concept that may vary with the particular situation. *Zinermon*, 494 U.S. 113, 108 L.Ed.2d at 115.

Matthews provides for a flexible standard to determine the protections required in a particular case, with the level of review consistent with the type and form of the deprivation. 424 U.S. at 335. What is significant in this case is that the violations at issue involved situations where the Legislature has provided specific due process safeguards requiring notice and hearing which the which the court chose to ignore and thus exceeded its power. *Cowan*, 230 Cal.App.3d at 1289.

The Legislature clearly determined that there was a private interest to be affected by the official acts of the

judiciary and that the risk of erroneous deprivation was sufficient to warrant concern. *Matthews*, 424 U.S. at 335. Further, implicit in the Legislative enactment is a determination that the procedures set forth in the statutes did not involve an unnecessary burden on governmental interests in light of the interests to be protected. *Id.*

In this case, although not clearly addressing the standard of review or using the magic words "abuse of discretion," the Court of Appeal clearly relied upon this standard. The court concluded that Petitioner's "first contention [that dismissal was invalid under the due process clause of the Fourteenth Amendment] is wholly without merit." In reaching this conclusion, the Court reasoned that the trial court is **authorized** to impose a variety of

sanctions where there is a misuse of the discovery process. The term authorized itself implies a discretionary power.

Sidestepping the validity of the initial order, the court found that Petitioner's conduct in not designating an expert was a clear violation of Code of Civil Procedure section 2034, subdivision (d) and dismissal was "fully warranted." From this we can read into the opinion the court's belief that there was no abuse of discretion. The court failed however to touch upon the fact that the court acted contrary to its jurisdiction and had no power to issue the original order.

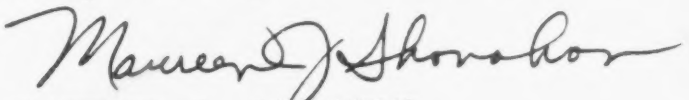
Petitioner has continuously maintained that the court acted without power and in excess of its jurisdiction, therefore review under the abuse of discretion standard was simply not sufficient to protect his fundamental due

process rights. This court should grant this petition to clarify the manner of review and determine that a stricter level of scrutiny must be applied whenever fundamental rights are implicated as being infringed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court grant this Petition.

Respectfully submitted,



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APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GEORGE HARRIS, Plaintiff and Appellant, v. TERRY L. HALE, et al., Defendants and Respondents.	)	No. B054865 (Super.Ct.No. NCC 27975B) Court of Appeal-Second Dist. Filed Aug - 6 1991

Plaintiff George Harris, proceeding in propria persona, appeals from the judgment dismissing with prejudice his suit against defendants Terry L. Hale and Terry L. Hale D.D.S., Inc. He contends:

"[I.] The judgment of dismissal is invalid under the due process clause of the Fourteenth Amendment to the U.S. Constitution and similar provisions of the California Constitution, and constitutes reversible error and abuse of discretion. [II.] The trial court erred in not granting appellant judgment on the pleadings where the verified complaint was not answered by a verified answer. [III.] The judgment as to the cost bill is invalid under the due process clause of the Fourteenth Amendment to the U.S. Constitution and similar provisions of the California Constitution."

The instant litigation arose from respondents' alleged dental malpractice and purported fraud in connection therewith. The case was previously before this court on appellant's appeal from a judgment of dismissal entered upon an

order sustaining without leave to amend respondents' demurrer to appellant's second amended complaint. We reversed the judgment as to courts one (negligence), two (fraud), eight (fraud) and nine (negligence) and remanded the matter "to the trial court for further proceedings consistent with the views expressed [in our decision]." (Harris v. Hale (Dec. 21, 1988) B029737, typed opn. p. 15, as modified on Jan. 4, 1989.)

Following our remand, appellant filed his third amended complaint and respondents answered. On April 6, 1990, at a hearing to consider respondents' motion to compel further responses to interrogatories, the trial court ordered "that the parties designate their experts within 30 days in full compliance with the code section." Trial was set for August 6.

On at least fours separate occasions the court advised appellant he was required to have an expert to avoid dismissal of his action at time of trial. It also instructed appellant, "[a]nd concern yourself with abiding by all the statutes in this case. You are not an attorney but you are held to the same standards as an attorney when you chose [sic] to appear in pro per. [¶] I don't want you coming back to this court in 30 days or 60 days and saying, 'Your Honor, I want [to be] excused from not complying with the codes.'"

Despite the court' admonitions, the parties were again before the court on July 13, 1990, on appellant's motion to vacate the trial date. As of that time, appellant still had not designated an expert. Although he orally represented he had "identified the expert," he asserted

respondent had "refused[d] to give [him] the one x-ray of [his] teeth so that [his] expert could satisfy himself that he was willing to undertake the assignment."[1] In response to the trial court's question, appellant admitted that, notwithstanding his complaints regarding respondents' conduct, he had made no motion to compel discovery. In fact, the only action he had taken was to file an ex parte application on May 31, 1990, to shorten notice for production of records, which the trial court rejected because it was beyond the expiration date for the designation of experts.

At the conclusion of the hearing, the court denied appellant's motion to vacate

[1] The declaration filed by appellant in support of his motion revealed that his communications with both the potential expert and respondents had taken place after the deadline for designating experts.

the trial date, with the caveat that the case would be dismissed if appellant was unprepared to go to trial on August 6.

When the matter was called for trial on Monday, August 6, appellant maintained he had located an expert, but conceded he had not designated this individual to respondents. He blamed respondents for his failure to do so, reiterating his earlier charge that respondents had "refused to give [him] the x-ray [he] needed to get that person" and declaring "it was only firmed up last Friday because of [respondents'] constant suppressing."

Consistent with its earlier warnings, the trial court granted respondents' in limine motions to exclude any expert testimony on behalf of appellant and to preclude appellant from testifying as a dental expert himself. Moreover, because it had determined that all of appellant's

claims required expert testimony regarding the standard of care and respondents' purported deviation therefrom, and that this was a subject outside the common knowledge of the trier of fact, the court further ruled appellant was "unable to prove his case under any circumstances" and granted respondents' motion to dismiss the case with prejudice.

Appellant's first contention is wholly without merit. The trial court is statutorily authorized to impose a variety of sanctions, including an evidence sanction and even dismissal of the action, where a party engages in the misuse of the discovery process. (Code Civ. Proc., Section 2023, subds. (b)(3), (b)(4).) Appellant's complaint that the court "violat[ed] C.C.P. 2034(c) which sets an entirely different time for designating witnesses than did the judge," is

unavailing for at least two reasons. First, the subdivision cited by appellant specifically permits the court to order "an earlier or later date of exchange" upon a showing of good cause. Second, the court did not sanction appellant when he failed to comply with May 7 date. Rather, the court imposed the evidence sanction which ultimately resulted in dismissal, only after the matter was called for trial some three months later and appellant still had neither designated an expert nor filed a motion seeking relief from his failure to abide by the court's discovery order under Code of Civil Procedure section 2034. In fact, even though appellant had allegedly retained an expert by that time, the individual was not available to testify, having "left on a planned foreign trip the week before the trial . . . " Appellant's conduct was a

clear violation of Code of Civil Procedure section 2024, subdivision (d) (time limitations applicable to discovery of expert witnesses), and was extremely prejudicial to respondents. Dismissal was fully warranted.

The trial court correctly pinpointed the source of appellant's problems when it stated, during the hearing on his motion to vacate the judgment, "You chose to come in and represent yourself. When you do that, when you appear in pro per, you are treated as though you are an attorney and you have the skill, knowledge, learning and experience of any other attorney. Unfortunately you did not. You did not know what you were doing, and that is your problem. It's not the problem of the defendants or the problems of this court. You have to bear the responsibility and the consequences of your own action or

inaction. [¶] You want to be a dentist and testify as to dental matters. You want to be lawyer and you want to be able to represent yourself and act, talk and do what lawyers do. Unfortunately you failed. You cannot come in here and testify as a dentist on standard of care. As a lawyer you horribly failed. You don't know what you're doing. You have unfortunately fouled up on discovery, designation of experts and all over the place. You just failed to comply with court orders, rules, regulations and statutes and under the circumstances you do not receive extra credit. You're not given special privileges. You have to live up to the standards of an attorney and you failed to do that. As a result your case was dismissed."

Appellant may not escape the impact of his noncompliance with the court's

order by arguing that expert testimony was unnecessary to prove his fraud count or to proceed on a res ipsa loquitur theory. In response to respondents' charge that the fraud claim asserted by appellant explicitly related to the treatment rendered by them, appellant explained that the x-ray he had obtained "clearly shows that when the dentist was paid $300 to do three roots at $100 a root, the patient ended up a year later at U.S.C. and only two of the roots were done. The dentist had charged $100 for a root and failed to do it. Had lied to the patient about doing it, and then the patient had an explosive episode of pain, screaming so loud he had to stick a towel in his mouth to keep the neighbors from calling the police to stop them from thinking someone was being killed because of this. [¶] The patient eventually went to the University of

Southern California. They put a piece of mental [sic], a probe it's called, into the jaw where the infection was draining. They had the plaintiff hold an x-ray film against his jaw. They took an x-ray. They developed it in the plaintiff's presence. Everybody looked at the x-ray, and it clearly shows that the infection was at the base of the root canal that the defendant had been paid to do, had said he had done and had not done. [¶] The x-ray showed that the bottom of the tooth had been butchered. It had been cut open creating a focus for infection. These things --"

Given appellant's description of the evidence, the trial court quite aptly observed, "These, sir, are medical questions that require expert testimony. The more I listen to you, the more it becomes apparent that you need a medical

expert to come in and testify. Every cause of action that you have before this court deals with whether there was medical negligence or medical malpractice in the treatment or lack of treatment by this doctor."[2]

It is equally evident this is not a case in which the doctrine of res ipsa loquitur is available. The issues touched upon by appellant in his discussion of the x-ray cannot possibly be resolved by reference to matters within the reach of lay experience. (See Belshaw v. Feinstein (1968) 258 Cal.App.2d 711, 718-721.)

Appellant's other attacks upon the dismissal of his action are equally unmeritorious. We do not perceive the

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[2] The correctness of the court's assessment is immediately apparent when one views the photographs appellant has incorporated into his reply brief to demonstrate he should have been permitted to proceed without an expert witness.

absence of an at-issue memorandum (former Cal. Rules of Court, rule 209(a)) to be particularly significant, since the purpose of the rule is to aid the trial court in its caseflow management. Our conclusion in this regard is borne out by recent amendments to rule 209(a) which expressly reserve in the trial court the right to set a case for trial when it "deems the case to be at issue or, if the court so requires, . . . when the parties have filed a joint at-issue memorandum. . . ."

Appellant suggests the trial court would have had to continue the case had it not been dismissed, thereby giving him a chance "to cure any 'alleged' default in expert designation." As evidence of his premise, he points to an order in which the same court on August 6, 1990, continued another cause on its own motion

"due to [a] congested calendar." Regardless of the disposition of that matter, however, the court explicitly stated it had "two open trial departments where [it] could send [the instant] case for trial." We have no reason to doubt the court's veracity on this point.

Appellant was duly served on April 6, 1990, with written notice of the court's order demanding that the parties engage in a mutual and simultaneous exchange of information concerning expert witnesses and therefore his claim of lack of written notice is baseless. In addition, respondents fully complied with Code of Civil Procedure section 2034's requirement that they included "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (Subd. (f)(2)(B). See Sprague v. Equifax, Inc. (1985) 166 Cal.App.3d 1012.)

Appellant has cited no authority, nor can we imagine any, which would place the court under a duty pursuant to Evidence Code section 730 "to appoint for [appellant] [respondents' own] experts. . . ."

Contrary to appellant's second contention, respondent filed a duly verified answer to appellant's third amended complaint. Appellant is seemingly under the misapprehension that because respondents executed the verification on November 16, 1989, and the answer is dated November 22, 1989, it somehow proves wrongdoing. However, there is no indication November 22 is the date the answer was prepared. Rather, it appears to be the date respondents' counsel signed it on their behalf. That this occurred after respondents had certified the document's

truth and accuracy is both understandable and appropriate.

Appellant's last contention also fails, with the exception of his request to reduce the cost bill by $137.00, which respondents concede to be appropriate. Undoubtedly, if appellant had simply called the attention of the court and opposing counsel to the August 6, 1990, order refunding "[a]ll jury fees on deposit," the court would have made the necessary corrections and spared appellant the need to appeal. The remaining items on respondents' cost bill are adequately supported by the record.

Finally, we note appellant has suffered no deprivation of his constitutional due process rights. "The fundamental requisite of due process is the opportunity to be heard at a meaningful time and in a meaningful

manner. [Citations.]" (Cordova v. Vons Grocery Co. (1987) 196 Cal.App.3d 1526, 1531.) The requirement was met here. The fact that appellant repeatedly failed to take the steps necessary to benefit from the opportunities available to him was directly attributable to his decision to represent himself, a decision for which he alone must bear the consequences.

The judgment dismissing appellant's action with prejudice is affirmed. The post-judgment order dated October 18, 1990, is modified to reduce the costs assessed against respondents from $1,755 to $1,618. The parties shall bear their own costs on appeal.

NOT FOR PUBLICATION.

_____, J.
GATES

We concur:

_____, P.J.
ROTH

_____, J.
NOTT

APPENDIX B

APPENDIX B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT M. WILSON, CLERK

DIVISION: 2 DATE: 08/23/91

George Harris
P.O. Box 1425
Los Angeles, CA. 90078

RE: Harris, George
vs.
Hale, Terry L.
2 Civil B054865
Los Angeles NO. NCC27975B

THE COURT:

Petition for rehearing denied.

APPENDIX C

APPENDIX C

Second Appellate District, Division Two,
No. B054865
S022892

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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GEORGE HARRIS, Appellant

v.

TERRY L. HALE Et Al., Respondents

Supreme Court
Filed
Nov 13 1991
Robert Wandruff
Clerk

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Appellant's petition for review DENIED. The request for an order directing publication of the opinion is denied.

LUCAS
Chief Justice

APPENDIX D

APPENDIX D

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED IN THIS PETITION

Pursuant to the Rules of the U.S. Supreme Court, Rule 14, subparagraphs 1.(f)and (k), the following are the pertinent portions of the applicable statutes and rules of court involved in this petition.

CALIFORNIA CODE OF CIVIL PROCEDURE

Section 34. [Code provisions apply to all courts: Exceptions.]

The provisions of this code relating to the commencement and prosecution of, and the practice, procedure, and enforcement of judgments and decrees in, actions and proceedings in trial courts, shall apply to all such courts, except where special provision is made for particular courts, or where a general provision is not applicable by reason of jurisdictional limitations.

Section 1005. [Time for giving notice of motion or filing opposing papers; Supporting material.]

(a) Written notice shall be given, as prescribed in subdivision (b), for the following motions:

* * *

(12) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.

(b) Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 15 calendar days before the time appointed for the hearing. . . . All papers opposing a motion so noticed shall be filed with the court and served on each party at least five court days, and all reply papers at least two court days before the time appointed for the hearing.

Section 2023. [Sanctions for discovery misuse]

(a) [Misuse of discovery process] Misuses of the discovery process include, but are not limited to, the following:

* * *

(7) Disobeying a court order to provide discovery.

* * *

(b) [Sanctions for discovery misuse] To the extent authorized by the section governing any particular discovery method or any other provision of this article, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process.

* * *

(3) [Evidence sanction] The court may impose an evidence sanction by an order prohibiting any party engaging in

the misuse of the discovery process from introducing matters in evidence.

(4) Terminating sanction] The court may impose a terminating sanction by one of the following orders:

* * *

(C) An order dismissing the action, or any part of the action, of that party.

* * *

(c) [Contents of motion for sanction] A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought.

Section 2034. [Exchange of expert trial witness information]

(a) After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses to the following extent:

(1) Any party may demand a mutual and simultaneous exchange by all parties of a list containing the name and address of any natural person, including on who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial.

* * *

(b) Any party may make a demand for an exchange of information concerning expert trial witnesses without leave of court. A party shall make this demand no

later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date.

(c) A demand for an exchange of information concerning expert trial witnesses shall be in writing and shall identify, below the title of the case, the party making the demand. The demand shall state that it is being made under this section.

The demand shall specify the date for the exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing

of good cause, orders an earlier or later date of exchange.

(d) The party demanding an exchange of information concerning expert trial witnesses shall served the demand on all parties who have appeared in the action.

* * *

(f) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.

* * *

(j) Except as provided in subdivisions (k), (l), and (m), on objection of any party who has made a complete and timely compliance with subdivision (f), the trial court shall exclude from

evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

(1) List that witness as an expert under subdivision (f).

(2) Submit an expert witness declaration.

(3) Produce reports and writings of expert witnesses under subdivision (g).

(4) Make that expert available for a deposition under subdivision (i).

* * *

(l) On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date. This motion shall be made a sufficient time in advance of the time limit for the completion of discovery

under Section 2024 to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court shall grant leave to submit tardy expert witness information only after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, and determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party (1) failed to submit that information as

the result of mistake, inadvertence, surprise, or excusable neglect, and (3) has promptly thereafter served a copy of the proposed expert witness information described in subdivision (f) on all other parties who have appeared in the action. This order shall be conditioned on the moving party making that expert available immediately for a deposition under subdivision (i), and on such other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion.

The court shall impose a monetary sanction under Section 2023 against any

party, person, or attorney who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

* * *

CALIFORNIA RULES OF COURT

The following is the text of the pertinent portions of California Rules of Court, Rule 209, as it existed at the time involved in this case. The rule was amended effective January 1, 1991.

Rule 209. Memorandum that civil case is at issue

(a) [Contents of at-issue memorandum] No civil case shall be placed on the civil active list or be set for a trial until it

is at issue and a party has served and filed an at-issue memorandum stating

(1) the title and number of the case;

(2) the nature of the case;

(3) that all essential parties have been served with process or appeared and that the case is at issue as to those parties;

(4) whether the case is entitled to legal preference, and, if so, a citation to the section of the code or statute granting the preference;

(5) whether a jury trial is demanded;

(6) the time estimated for trial; and

(7) the names, addresses, and telephone numbers of the attorneys for the parties or of parties appearing without counsel.

For purpose of this rule and rule 210, a case may be considered at issue notwithstanding any cross-complaint that

is not at issue if the cross-complaint has been on file for six months or more.

This rule shall not affect the authority of the court to order a severance of a cross-complaint pursuant to Code of Civil Procedure section 1048.

* * *

(c) [Countermemorandum] A party not in agreement with the information or estimates given in an at-issue memorandum shall within 10 days after the service thereof serve and file a memorandum on the party's behalf.

APPENDIX E

APPENDIX E

EXCERPTS FROM RECORD WHERE DUE PROCESS CHALLENGES WERE RAISED.

Pursuant to the Rules of the Supreme Court, Rule 14, subparagraphs 1.(h) and (k)(v), the following sets forth the specific instances where Petitioner raised the issue of due process violations with specific quotations to pertinent portions of the record demonstrating that the federal questions were timely and properly raised by Petitioner acting in pro per both at the trial and appellate levels.

1. NOTICE OF MOTION FOR ORDER FOR JUDGMENT ON THE PLEADINGS IN FAVOR OF PLAINTIFF AND VACATION OF TRIAL DATE WITH MEMORANDUM OF POINT OF AUTHORITIES AND REQUEST FOR OFFICIAL REPORTER filed on June 22, 1990.

By this motion Petitioner sought to obtain judgment on the pleadings for failure of Respondents to provide a properly verified answer and to vacate the trial date based on due process violations

under the Fourteenth Amendment. The specific portions where Petitioner challenged the court's actions of setting the case for trial and requiring expert witness designations without following the recognized statutory procedures and violated his Fourteenth Amendment rights are at page 11 of the motion and state:

> Forcing Plaintiff to trial without complying with the stated due process of law inherent in and prescribed by CRC 209(a) would deprive him of his property rights in his cause of action contrary to the Fourteenth Amendment to the United States Constitution, and to Sec. 7 of Article I of the California Constitution, to the extent that he would not have proper time to prepare for the trial and proper notice and fair hearing of his cause. Similarly there are important due process problems in the expert witness proceedings, such as CCP 2034 (c) being bypassed. Vacating the trial date thus appears essential, even if Judgment on the Pleadings is not ordered in plaintiff's favor. Regardless of CRC 209(a), Plaintiff has here stated a Fourteenth Amendment compelling ground for vacation of the trial dates for just trial preparations, otherwise stated as in the interest

of justice in fair hearing.

2. PLAINTIFFS' BRIEF REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND FOR VACATION OF TRIAL DATE WITH DECLARATION FILED ON JULY 10, 1990.

Plaintiff further raised his challenge to a denial of his Fourteenth Amendment rights at page 3 of this Document stating:

> As for evidence in the record supsupporting Plaintiff's contention that being forced to trial without fair time to prepare is a denial of his FOURTEENTH AMENDMENT right to his property in his cause of action without due process of law, one need only look at Defendants' unseemly AFFIRMATIVE, active and aggressive attempt in their opposition to bring the matter to trial on a rushed basis to prejudice Plaintiff out of a fair hearing, . . .

3. NOTICE OF MOTION TO VACATE ORDER IN JUDGMENT OF DISMISSAL AND TO STRIKE AND TAX COST BILL WITH COMBINED MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATIONS AND REQUEST FOR OFFICIAL REPORTER FILED ON ABOUT SEPTEMBER 11, 1990.

After the judgment was entered against him, Petitioner filed the above motion to vacate wherein he claimed that:

> [T]he here-attacked proceedings represent the State depriving Plaintiff of his personal property contemplated by Civil Code 655 without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and are therefore void and Plaintiff is here in entitled to relief against same. Emphasis in original at p. 3.
> 3.

Later at page 8 of this motion, Petitioner asserted as follows:

> CCP around 581 gives the Court no dismissal authority in the circumstances here. The Dismissal was therefore a surprise and inadvertence and excusable neglect and mistake as to Plaintiff not being able to properly urge and present compelling arguments against same ON NO NOTICE where due process under the FOURTEENTH AMENDMENT requires like detailed written 15 day notice before such drastic actions be submitted for decision.
>
> * * *
>
> To conclusively dismiss the action because of any arguably excusable late identification of an expert is simply some sort of a punitive action not constant with justice, prejudice to the defendants cannot be conclusively presumed in advance on no evidence, especially when it is presumed that professional people will

> speak the truth, and such punitive action violates the FOURTEENTH AMENDMENT. (p. 20, emphasis in original)

4. PLAINTIFF'S COMBINED OPPOSITION DECLARATION-REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO VACATE THE DISMISSAL FILED ON OCTOBER 3, 1990.

In this document at page 18, Petitioner stated:

> One of the principles of Equity and justice is that no one should be allowed to profit from their own wrong. Here we have a wronged plaintiff, with the Court and defendants relieved of a meritorious case. Equity and justice thus demands vacation of dismissal as does the Fourteenth Amendment on the 50 days and other arguments!

5. HEARING ON ORAL MOTIONS IN LIMINE AND TO DISMISS HEARD PRIOR TO TRIAL ON AUGUST 6, 1991.

At the hearing on the various Motions *In Limine* just prior to trial, Petitioner stated:

> If Your Honor please, at this point I will raise again the Constitutional issue of the 14th Amendment that my property rights in my cause of action are being violated because I am being denied due process of law throughout. And to point that out to make a more

precise of that, it is not within due process of law to pronounce an evidentuary sanction as compelling as counsel is asking for merely because I have not given public records of the State of Colorado which he has already presented this court with. That is an outrageous violation of due process of law to impose an evidentuary sanction against me that I cannot testify at all in my own case because I have not given Mr. Waserman a piece of paper that he presented another copy of the same one to this court in his ex-parte opposition. R.T. 25:8-22.

* * *

It violates due process to estop me from giving my evidence on the main issue of the case because my residence address or a public record of the State of Colorado has not been given to Mr. Waserman. R.T. 26:4-7.

* * *

If Your Honor please, I believe that these motions and this motion in limine violates the 14th Amendment due process because there's not adequate notice of the motion and time for a full fair hearing on the motion, and I shall therefore continue my continuing objection under the 14th Amendment denial of due process to the preceedings here.

I am not able to comprehend every--thing that Mr. Waserman said because I have not had a chance to look at it

> carefully. He just rattled it off and I cannot make an adequate reply to it unless the reporter will read it back to me. R.T. 29:10-21.

Still later when questioned as to how he could prove his case without expert testimony, Petitioner stated:

> On this very short notice without due process adequate notice, I cannot give this court a conclusive argument as to exactly how I'm going to prove every bit of that fraud. R.T. 32:1-3.

Finally concerning these motions, Petitioner stated:

> In conclusion of this point, I would state that it is a violation of the 14th Amendment, due process right in my property not to let me bring an expert witness and other testimony on a mere desire to make your statistics before the judicial counsel [sic] look better on five year cases. R.T. 36:9-13.

On August 6, 1991, after the court solicited and counsel made an oral motion to dismiss, Petitioner immediately stated:

> If Your Honor please, I will oppose the motion to dismiss on the grounds that the entire proceedings behind that motion are a violation of the

> 14th Amendment property rights of the Plaintiff in his cause of action which can be taken by the State only by due process of law, and it is not due process of law to set this case for a trial without an ad [sic] issue memorandum in express violation of California Rule of Court 329, I believe. I may be wrong on the rule number, but these proceedings don't give me much time to look up every-everything.
>
> That's another violation of due process. I'm not given adequate time and I am ready to go to trial. I have all the evidence that the court might allow me to present, and I have in these straight circumstances can think of nothing further to add. Thank you, Your Honor. R.T. 39:4-18.

6. APPELLANT'S OPENING BRIEF FILED WITH THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

Petitioner's main argument contained in his Opening Brief addressed the denial of due process indicating at page 11:

> the judgment of dismissal is invalid under the due process clause of the Fourteenth Amendment to the U.S. Constitution and similar provision of the California Constitution, and constitutes reversible error and abuse of discretion.

7. APPELLANT'S REPLY BRIEF FILED WITH THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO.

In his reply brief, Petitioner argued as follows:

> **RESPONDENTS' BRIEF ERRS SUBSTANTIALLY IN CLAIMING THAT THE JUDGMENT BELOW WAS NOT A VIOLATION OF DUE PROCESS.**
>
> Respondents' argument cleverly tries to evades the Due Process points made by Appellant. Respondents seem to argue that a court may properly transgress stated procedures so long as the party is given "opportunity to be heard." (R.B. 11.)
>
> Due Process incompasses for more than that, extending practically to Justice itself through due procedures, "a government of laws and not of men", procedures agreed in advance and in detail, objective standards instead of subjective decisions of fallible men, at least as far as practical.
>
> A good authority on the subject, one taught in every lawschool text/case book on the subject, is the decision of Pennoyer v. Neff (1877) 95 U.S. 714. At pages 732-733 it is discussed that since the recent "adoption of the Fourteenth Amendment" judgments in violation of Due Process are void and of no effect. The aspect of due process in that case was jurisdiction, not notice and fair hearing.

> The aspect of due process in this current HARRIS case is compliance with due procedural steps and fairness. The Pennoyer decision there gives to the term due process of law "a definition": "a course of legal proceedings according to those rules and principles which have been established in our system of judicial prudence for the protection and enforcement of private rights." (underlining added.)

8. APPELLANT'S PETITION FOR REHEARING TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

At page 22 of the Petition for Rehearing, Petitioner stated:

> The Court has omitted the substantial issue that the trial court had no jurisdiction to dismiss and that Fourteenth Amendment due process required at least proper process thru non-suit, preferably before a more impartial judge, and the trial error was not clearly harmless as the trial might have been saved by any of the circumstances here argued or perogative writ in the meantime in another Division dedicated to preserving the right to jury trial.

At page 23, Petitioner states:

> This throwing the case out of court without giving plaintiff Fourteenth Amendment due process jury trial is petitioned as compelling cause to

grant review of the proceedings . . .

Later at page 24, Petitioner argued:

> In the rush due to failure of the Court's mail, Appellant must re-urge all his Fourteenth Amendment Due Process points to prevent any possible waiver, as well as like denial of Equal Protection points where he is held to " laws" and excuses are made at every turn for his opponents' violations.

9. PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

At pages 10 through 14, Petitioner discusses the due process violations in this case. Specific portions under this argument are set forth below:

THE MASS OF PROCEDURES BELOW WERE UNJUST, VOID, AND DEPRIVED PETITIONER OF PROPERTY AND LIBERTY WITHOUT THAT DUE PROCESS OF LAW PROTECTED BY THE FOURTEENTH AMENDMENT.

> Hurtado v. Western (1990) 222 C.A.3d 1198, 1203, holds that where a trial court misapplies or misinterprets a discovery statute to the prejudice of a party, that its order is void. In this Harris case therefore the trial court order slashing the statutory 71 days to designate experts to only 30 days, without the required "noticed motion" and "good cause" of C.C.P.

2034(c), is therefore void and also a Pennoyer violation of due procedures. Since the Court of Appeal decided otherwise, THIS is an important question of law and uniformity of decision issue for this Court. Petition for Review, p. 10.

* * *

C.R.C. 209(a) at time of trial required an at-issue memorandum before trial could be set; this was a due process protection under the Fourteenth Amendment that petitioner was entitled to, not to be arbitrarily denied. . . . The Rules are a restriction on arbitrary acts of the trial court, not a license to ignore them.

There is the point that contrary to the express words of the new statute that the Court of Appeal did not require respondents to have given a "narrative statement" of the "substance" (not 'subjects') of the expected testimony (C.C.P. 2034 (f)(2)(B)) TO HAVE STANDING TO THROW OUT PETITIONER'S WITNESS under C.C.P. 2034(j). The pertinent A.A. 99-102 do not even give the REQUIRED address for witness Hale (C.C.P. 2034 (f)(1)(A)). Kennamur wisely points to favored pre-trial settlement possibilities as a goal of "substance", which makes substance a property right that the Court of Appeal has denied petitioner in violation of Fourteenth Amendment due process;this Court has as a goal all reasonable encouragement of procedures to settle

instead of clogging trial courts, and should so strike down the OPINION OF THE COURT OF APPEAL ON THIS SUBJECT! Kennemur also notes that laymen could properly decide the highway was dangerous and no experts should be involved, just as Harris contends that he was denied due process trial to the jury . . . .

. . . Petitioner is entitled to be given a due process clean slate of either dismissal reversed for respondents to give NOW a full narrative, or petitioner's expert being allowed to testify with dismissal reversed !! Peralta v. Heights (1988) 485 U.S. 80, 87 as to only "wiping the slate clean" is adequate for due process. Also, Ward v. Village (1972) 409 U.S. 57.

The case also shows clear denial of due process under the Fourteenth Amendment when the trial judge, intent on railroading petitioner out of a trial out-of-the-judge's-hands-to-punish-petitioner, denied FAIR HEARING or any hearing at all ! R.T. 24, lines 8-15, shows the judge refusing to hear 5 important legal points on the day the judge denied the trial, abdicating all responsibility to the appellate courts (who certainly have enough work of their own to do !). On motion for relief from dismissal, the trial judge interrupted Petitioner's presentation and launched upon a morally corrupt, self-serving 2 page monologue in which he precluded further hearing by again abdicating (R.T. 52, line 7) 'TAKE IT UP ON

APPEAL".

A further denial of Fourteenth Amendment due process below relates to the many applications properly made for relief from 'default' in re supposedly untimely designation of expert witnesses by petitioner. Despite the good grounds given therefor, the trial court refused to grant any of them: 4-6-90 on the date of the wrongful '30 day' order: 5-31-90 (A.A. 33-43); noticed motion on 7-13--90 (A.A. 44-66); the proceedings on trial date 8-6-90; and the proceedings 10-5-90 for relief. For conciseness, the cases cited and quoted A.R.B. 3-5 are in close point, as well as important Pete v. Henderson (1954) 124 C.A.2d 487, 491-492. The COMPELLING good grounds for said relief are associate with the California courts' acknowledgment (like Belshaw v. Feinstein (1968) 258 C.A.2d 711, 719; also see A.A. 90) . . . . Petition for Review at pages 12-14.